

*The original of this document contains information which is subject to withholding from disclosure under 5 U.S. C. § 552. Such material has been deleted from this copy and replaced with XXXXXX's.

**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of: Personnel Security Hearing)	
)	
Filing Date: May 10, 2021)	Case No.: PSH-21-0060
)	
_____)	

Issued: September 1, 2021

Administrative Judge Decision

Kimberly Jenkins-Chapman, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXX (hereinafter referred to as “the Individual”) to hold an access authorization under the Department of Energy’s (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled “General Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.”¹ As discussed below, after carefully considering the record before me in light of the relevant regulations and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (June 8, 2017) (Adjudicative Guidelines), I conclude that the Individual’s access authorization should not be granted.

I. Background

The Individual, an applicant, is employed by a DOE Contractor in a position which requires that he hold a security clearance. On December 19, 2019, the Individual completed, signed, and submitted a Questionnaire for National Security Positions (QNSP). Ex. 8. In conjunction with the investigation, the Local Security Office (LSO) obtained a copy of the Individual’s credit report on December 31, 2019. Ex. 7. The Individual subsequently underwent an Enhanced Subject Interview (ESI) performed by an Office of Personnel Management (OPM) investigator on January 8, 2020, during which the Individual was asked questions pertaining to a recent lawsuit filed against him and his limited liability company (LLC). Ex. 9. Based on the information gathered, the LSO requested that the Individual complete a Letter of Interrogatory (LOI), which he signed and submitted on July 6, 2020. Ex. 5. After reviewing this information, the LSO determined that unresolved derogatory information remained in the record regarding his personal conduct and

¹ Access to authorization is defined as “an administrative determination that an individual is eligible for access to classified mater or is eligible for access to, or control over, special nuclear material.” 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access to authorization or security clearance

finances which raised significant security concerns about the Individual. On September 10, 2020, the LSO issued a Notification Letter informing the Individual that the LSO possessed reliable information that created substantial doubt regarding his eligibility to hold a security clearance. The Notification Letter further informed the Individual that he was entitled to a hearing before an Administrative Judge to resolve these substantial doubts. *See* 10 C.F.R. § 710.21.

The Individual requested a hearing, and the LSO forwarded the Individual's request to the Office of Hearings and Appeals (OHA). The Director of OHA appointed me as the Administrative Judge in this matter. At the hearing I convened pursuant to 10 C.F.R. § 710.25(d), (e), and (g), the Individual offered his own testimony and that of three witnesses. *See* Transcript of Hearing, Case No. PSH-21-0060 (hereinafter cited as "Tr."). The DOE counsel submitted nine exhibits, marked as Exhibits 1 through 9 (hereinafter cited as "Ex."). The Individual submitted four exhibits, marked as Exhibits A through D.

II. The Notification Letter and the Associated Security Concerns

As indicated above, the Notification Letter informed the Individual that information in the possession of the DOE created substantial doubt concerning his eligibility for a security clearance. That information pertains to Guidelines E (Personal Conduct) and F (Financial Considerations). Under Guideline E, "[c]onduct involving questionable judgement, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information." Adjudicative Guidelines at ¶ 15. With respect to Guideline E, the LSO alleged that: 1) On December 9, 2019, the Individual's employer (hereinafter X Corporation) filed a complaint for damages in excess of \$200,000 against the Individual personally, as well as his LLC, alleging that during the Individual's tenure of employment, he awarded contracts for business and conferred benefits to his LLC and himself in the form of kickbacks and/or bribes; 2) the Individual confirmed that while employed with X Corporation, in exchange for guaranteeing work to a traffic control company, he would take a percent of the amount paid by X Corporation for the work performed by the traffic control company (resulting in his receipt of approximately \$120,000 from February 2018 through September 2019); 3) the Individual created an audio recording of a meeting without the permission or the knowledge of meeting attendees, knowing that this action was in violation of workplace policies. Ex. 1 at 1.

Guideline F (Financial Considerations) provides that an individual's failure to live within one's means, satisfy debts, and meet financial obligations "may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information." Guideline F at ¶ 18. With respect to Guideline F, the LSO alleged that: 1) the Individual has a collection account totaling \$45,234, which he does not intend to resolve; 2) As stated above, X Corporation filed a complaint for damages against the Individual in the amount of \$200,000, which the individual does not intend to defend and which will result in a financial judgement against the Individual. Ex. 1 at 2.

III. Regulatory Standards

A DOE administrative review proceeding under Part 710 requires me, as the Administrative Judge, to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all of the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). The entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." Adjudicative Guidelines ¶ 2(a). The protection of the national security is the paramount consideration. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for granting security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance).

The Individual must come forward at the hearing with evidence to convince the DOE that granting or restoring access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). The Individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

IV. Findings of Fact

During a January 8, 2020 ESI, the Individual disclosed that he had been reprimanded by X Corporation after he made an audio recording of a meeting, despite failing to receive permission or notifying the attendees. Ex. 9 at 59. The Individual stated that he made the recording in an effort "to prove to the Human Resources manager that the Chief Executive Officer (CEO) was "a bully." Ex. 5 at 7. Although he felt this behavior was justified, he did indicate that he would not repeat this behavior. Ex. 5 at 8.

He also informed the OPM investigator during the ESI that he used his uncle's address to establish his own LLC, in February 2018, of which he was the only employee. Ex. 9 at 60; Ex. 6 at 2. While employed with X Corporation as the vice president of the construction division, the Individual was billing a client of X Corporation, a traffic control company, "a consulting fee through [his] business." Ex. 9 at 62. The "consulting fee" was to guarantee that said client's workers were receiving work each week with X Corporation. Ex. 9 at 62; Ex. 6 at 3-4. The Individual was receiving seven percent of the amount X Corporation paid the client for work performed. Ex. 9 at 62; Ex. 5 at 4. As a result, the Individual collected \$120,000 from February 2018 to September 2019. Ex. 9 at 62; Ex. 5 at 4. He denied engaging in a "kickback scheme" and did not believe that

his actions “were wrong or illegal,” stating that he believed that he was only consulting, and the sincerity of this belief was evidenced by the fact he paid taxes on the \$120,000. Ex. 5 at 5-6.

In his July 6, 2020 LOI, the Individual stated that a hearing had not been held in the civil suit that was filed against him by X Corporation, and further, that after consulting with various attorneys, he was resolved to allow X Corporation to obtain a default judgement against him, as the attorney’s fees alone “would be a loss for [him].” Ex. 5 at 1, 3. The Individual did not directly address whether he believed his actions “constitute[d] a breach of fiduciary duty, conversion, breach of duty of undivided loyalty, breach of implied contract, unfair business practices, and breach of contract, but he stated that the “relationship with the CEO [of X Corporation] had been unhealthy for the past few years[,]” and that he “believe[s] this is just [the CEO] continuing his bullying ways.” Ex. 5 at 5.²

The Individual stated that he has no intention of satisfying his debt totaling \$45,234. Ex. 9 at 61; Ex. 5 at 10. He explained this debt was a student loan incurred to attend a technical institute, an institution that misrepresented his ability to transfer credits earned to another institution. Ex. 5 at 10.³ He stated that he has no intention of filing a lawsuit in relation to the alleged fraud, as he does not “have the resources or desire to file a lawsuit[,]” but noted that a judgement was rendered against the technical institute in 2016 regarding in part its claims regarding the transferability of credits. Ex. 5 at 10. As a result, the Individual applied on June 17, 2021, to the United States Department of Education to receive forgiveness for the totality of the student loans. Ex. B.

V. The Hearing

The Individual’s witnesses, including his current and former work colleagues, testified they were made aware of the civil suit that was filed against the Individual. Tr. at 15, 26, 49. All witnesses stated that they believe the Individual to be reliable, and the Individual’s superintendent testified that the Individual admits to his mistakes and “follows the rules.” Tr. at 17-18, 34, 52. The Individual’s superintendent felt the Individual was honest about the allegations contained in the lawsuit and disclosed to her that the allegations were accurate. Tr. at 15-16, 20. Another witness testified the Individual disagreed with the allegations made against him in the lawsuit, but did indicate they caused him some surprise, as he had never known the Individual to “act purposely in a manner like that.” Tr. at 51.⁴ However, the same witness testified that he has “the utmost

² The Individual submitted a screenshot of the case status through the superior court’s online portal, which indicates that the matter was dismissed on September 25, 2020. Ex. C.

³ The Individual submitted a June 16, 2021 press release from the United States Department of Education indicating that the Department of Education was announcing the approval of the borrower defense claims for former attendees of the technical institute. Ex. A at 1. According to the article, one hundred percent of the loans of qualifying borrowers will be discharged. Ex. A at 1.

⁴ Later, the witness stated that when he spoke to the Individual regarding the lawsuit, the Individual indicated that he did not feel his actions were illegal at the time; however, the witness did state that he can appreciate how the

confidence in [the Individual's] ethics, honesty, and ability to perform[.]" and confirmed that he believes the Individual can follow rules and regulations. Tr. at 52-53.

The witness who worked with the Individual during his tenure at X Corporation confirmed that the Individual had been securing work for a traffic control company, and in return, the company was "giving him money back." Tr. at 26.⁵ The same witness, who has known the Individual for twenty-six years, stated that he trusts the Individual "with everything [he has]." Tr. at 33-34. He also testified that all meetings at X Corporation were recorded as a matter of course, but that certain occurrences, like the CEO's outbursts, "[did not] ever make the record[ing]." Tr. at 41.

The Individual testified that he incurred the \$45,234 debt by taking classes with a technical institute, and upon learning that his credentials would not be recognized by his employer, he attempted to transfer the credits he received from the technical institute to another institution. Tr. at 60. He learned that his credits were, in fact, not transferrable to the institution of his choosing. Tr. at 60. Accordingly, the Individual ceased making his student loan payments, and he subsequently filed a borrower defense application with the Department of Education. Tr. at 61-62, 91.⁶ He also testified that the X Corporation civil suit that was filed against him was dismissed in September 2020, which he learned of in 2021, as he had not been in contact with the Corporation, their attorneys, or the court system regarding the matter. Tr. at 64-65.

Regarding the allegations in the suit, the Individual explained that at the time he was employed with X Corporation, they needed a nonunion traffic control company. Tr. at 65-66. The traffic control company would be guaranteed work if they could provide a specific number of workers every day. Tr. at 66. The Individual stated that he consulted an attorney prior to establishing his LLC to continue his relationship with the traffic control company, and the attorney informed him that X Corporation "might not like it, but it's not illegal." Tr. at 67-68.⁷ He testified that he had

Individual's actions can be interpreted as both lawful and unlawful. Tr. at 56-75. Further, the Individual told the witness that he would take responsibility for his actions in the event they were, in fact, wrong. Tr. at 57.

⁵ The witness clarified that he had not been aware of this agreement between the Individual and the contractor as it was occurring and first learned of it when the Individual informed him of the lawsuit. Tr. at 26-27. The witness was not employed with X Corporation at the time the lawsuit was filed. Tr. at 27-28. The same witness also confirmed that he had noticed "friction" between the Individual and the CEO, and he felt "that the lawsuit was more of a personal vendetta against [the Individual]." Tr. at 30-31. The witness confirmed that he "[does not] know how illegal" the arrangement was, but stated that he "know[s] that in the construction world[,] things like that are done all the time." Tr. at 39.

⁶ At the time of the hearing, the Individual did not have any information regarding either the status of the borrower defense application or how long the approval process takes, and further, he confirmed that the loan continues to appear on his credit report. Tr. at 62-63. He testified that he intends to reach out to the Department of Education to inquire about the status of his application after ninety days have passed. Tr. at 90. He customarily discards notices pertaining to the debt. Tr. at 63. The Individual last made a student loan payment in 2013. Tr. at 91.

⁷ The Individual acknowledged that the allegations "really sound awful," but at the time, he was properly invoicing the company, working with the company through his LLC, and filing taxes for the money he earned from this agreement. Tr. at 68-69. The CEO of X Corporation was not aware he was engaging in this behavior, and further, it

not informed the CEO of X Corporation of this arrangement and was not aware of any company policy prohibiting such arrangements. Tr. 69-70. He explained his failure to address the topic by stating that it “[j]ust never really...came up[.]” and he only realized that the arrangement may have been problematic when he was served with the lawsuit. Tr. at 82-83. Later, the Individual stated that he refrained from telling anyone about the arrangement because, although he never felt “ashamed” of what he was doing, he “[did not] want to share the wealth[.]” Tr. at 86-87. The Individual was only educated on the fiduciary duty he owed X Corporation when he consulted an attorney after he became aware of the lawsuit. Tr. at 86.

The Individual admitted that he had made an audio recording of an offsite meeting with the CEO, knowing he would be leaving his employment with X Corporation. Tr. at 70. Although the Individual had previously attempted to address the CEO’s alleged problematic behavior with their human resources office, he decided to take further action by concealing a recorder in his pocket so that he could provide direct proof of the CEO’s behavior. Tr. at 72.⁸ The human resources office provided a copy of the recording to the CEO of X Corporation, which resulted in the Individual receiving a written reprimand. Tr. at 75. As every meeting had been recorded by the CEO or a senior vice president, the Individual stated that he did not specifically know that the act of recording was in violation of company policy. Tr. at 76.

VI. Analysis

Guideline E

The Adjudicative Guidelines provide, in relevant part, that an Individual can mitigate security concerns under Guideline E if the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment. Adjudicative Guidelines at ¶ 17(c).⁹

was only in hindsight that he realized he owed a fiduciary duty to X Corporation. Tr. at 69. The Individual denied receiving any training on the fiduciary duty he owed the corporation upon receiving the title of vice president. Tr. at 77. The Individual testified that X Corporation became aware of this arrangement when it improperly accessed his personal email account, which he used to conduct business with the traffic control company. Tr. at 80-81. The Individual had departed X Corporation in August 2019 and the lawsuit was filed in December 2019. Tr. at 82.

⁸ The Individual testified that he concealed the recorder so that the CEO would not alter his behavior upon realizing the meeting was being recorded. Tr. at 88. One witness testified that, on the occasion the Individual made an audio recording of the hearing, the CEO had made particularly egregious statements. Tr. at 41.

⁹ Conditions that could mitigate Guideline E concerns include:

- (a) The individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) The refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

During his employment with X Corporation, which ended in late 2019, the Individual collected approximately \$120,000 from February 2018 through September 2019, a considerable and extended period, as a result of an arrangement he made with a traffic control company outside of the knowledge of the CEO of X Corporation. When asked why he failed to disclose the fact he had created an LLC to make the previously discussed arrangement with a traffic control company, the Individual first stated that he never disclosed the arrangement because the item was never the topic of conversation. When pressed further on the matter, the Individual admitted that he was reluctant to risk the possibility of sharing the profits he was reaping from this endeavor, and further, stated that he did not consider the fact that he owed X Corporation a fiduciary duty as vice president until after the lawsuit was filed. Not only are the Individual's explanations less than credible, but his explanations fail to resolve concerns over the Individual's judgement.

Although the Individual testified that he had consulted an attorney regarding the legality of the arrangement he had with the traffic control company, his stated concerns with disclosing the existence of this agreement to his employer only extended to the possibility that he would be forced to share the profits he was receiving. X Corporation only learned of the arrangement after the Individual left the corporation's employment, suggesting the Individual had some understanding that the arrangement was questionable in nature and accordingly, he kept it hidden.

Regarding the matter of the recording, the Individual stated that his sole intent was to make human resources aware of the CEO's alleged improper behavior, and thus, he hid a recorder from sight and failed to disclose the fact he was making the recording. Again, he failed to consider company policy or the ethics of making the audio recording. Unfortunately, his desire to remedy bullying behavior does not allay concerns regarding this display of poor judgement.

Guideline F

-
-
- (d) The individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;
 - (e) The individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;
 - (f) The information was unsubstantiated or from a source of questionable reliability; and
 - (g) Association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Adjudicative Guidelines at 17(a)-(b), (d)-(g). I have not addressed these mitigating factors as they are not applicable in this case.

The Adjudicative Guidelines provide, in pertinent part, that an Individual can mitigate security concerns under Guideline F if:

- (a) The behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgement;
- (d) The individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts;
- (e) The individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue;

Adjudicative Guidelines at ¶ 20(a), (d)-(e).¹⁰

Considering the record in its entirety, I am unable to conclude that the Individual has mitigated Guideline F concerns. The debt that was incurred for the common occurrence of obtaining higher education remains unresolved, and as a result, it did not happen so long ago, was not infrequent, and did not happen under such circumstances that would not cast doubt on the Individual's judgment.

The Individual disputes the validity of the student loan debt in the amount of \$45,234, and accordingly, he submitted a June 2021 Department of Education press release indicating former attendees of the technical institute would be permitted to file a borrower defense claim, as well as a copy of the borrower defense application he signed on June 17, 2021. While there appears to be a reasonable basis to dispute the validity of the debt, the Individual's behavior under the circumstances leaves much to be desired. Even if the Individual submitted his application for borrower defense at the earliest possible moment, by his own testimony, the Individual ceased submitting payments on the loan in approximately 2013, simply discarding any notices regarding the matter. While his anger at the alleged misrepresentation is understandable, the Individual had

¹⁰ Conditions that could also mitigate Guideline F concerns include:

- (b) The conditions that resulted in the financial problem were largely beyond the person's control (*e.g.*, loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;
- (c) The individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or under control;
. . . .
- (f) The affluence resulted from a legal source of income; and
- (g) The individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

Adjudicative Guidelines at 20(b)-(c), (f)-(g). I have not addressed these mitigating factors as they are not applicable in this case.

years to find a legitimate and acceptable solution to resolve or take reasonable steps in resolving the matter of the unpaid debt, but instead, he simply chose not to make payments. The Individual described his irresponsible behavior at the time as “kind of like a seven-year-old stomping their feet like [they are] not getting their way[.]” Tr. at 90. This is a considerable debt that had not been resolved as of the date of the hearing, and concerning, the Individual could not provide any specific information regarding the status of his application for borrower defense or how the application is processed. Accordingly, I have no evidence before me to indicate whether this debt will be resolved in a satisfactory manner.

The Individual’s indifference to the matter of the debt is also reflected in his indifference to the progression of the lawsuit filed against him, which suggests that he did not entirely grasp the gravity of the events that were transpiring. He admitted that he failed to remain in touch with anyone who could provide him with information regarding the progression of the suit, even failing to retrieve a copy of the dismissal for the purposes of this case. Accordingly, based on the totality of the circumstances and the fact the Individual failed to act in good faith to repay or resolve his debts, I am unable to conclude that the Individual resolved the Guideline F concerns.

VII. Conclusion

Upon consideration of the entire record in this case, I find that there was evidence that raised concerns regarding the Individual’s eligibility for a security clearance under Guidelines E and F of the Adjudicative Guidelines. I further find that the Individual has not succeeded in fully resolving all of those concerns. Therefore, I cannot conclude that granting DOE access authorization to the Individual “will not endanger the common defense and security and is clearly consistent with the national interest.” 10 C.F.R. § 710.7(a). Accordingly, I find that the DOE should not grant access authorization to the Individual at this time.

Kimberly Jenkins-Chapman
Administrative Judge
Office of Hearings and Appeals